

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KFD ENTERPRISES, INC.,

No. C 08-4571 MMC

Plaintiff,

v.

CITY OF EUREKA,

Defendant.

**ORDER DENYING ENVIRONMENTAL  
RESOLUTIONS, INC.'S MOTION TO  
DISMISS KFD'S FOURTH AMENDED  
COMPLAINT; DENYING WITHOUT  
PREJUDICE ENVIRONMENTAL  
RESOLUTIONS, INC.'S MOTION FOR  
JUDGMENT ON THE PLEADINGS AS TO  
THE CITY OF EUREKA'S FOURTH  
AMENDED COUNTER-CLAIM AND  
CROSS-CLAIM**

\_\_\_\_\_  
And Related Counterclaims, Cross-claims,  
and Third-Party Claims.  
\_\_\_\_\_

Before the Court is defendant, third-party defendant and cross-defendant Environmental Resolutions, Inc.'s ("ERI") motion, filed February 18, 2011, to dismiss plaintiff's Fourth Amended Complaint ("4AC").<sup>1</sup> Plaintiff KFD Enterprises ("KFD") has filed opposition to the motion, to which ERI has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.<sup>2</sup>

1. ERI's motion to dismiss the 4AC's First and Third Claims for Relief to the extent

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<sup>1</sup> By the same motion, ERI moves for judgment on the pleadings with respect to the City of Eureka's Fourth Amended Counter-Claim and Cross-Claim. As the pleadings have not yet closed, ERI's motion, to the extent it seeks such judgment, is hereby DENIED as premature, see Fed. R. Civ. P. 12(c), without prejudice to ERI's refileing such motion once the pleadings are closed.

<sup>2</sup> By order filed March 29, 2011, the Court vacated the hearing scheduled for April 1, 2011.


1 such claims allege ownership liability as defined, respectively, under the Comprehensive  
2 Environmental Response and Compensation Act ("CERCLA") and California's Hazardous  
3 Substance Account Act ("HSAA"), is hereby DENIED as moot, for the reason that KFD  
4 does not allege ERI is liable as an "owner" under either CERCLA or the HSAA. (See 4AC ¶  
5 39 (alleging "ERI is subject to CERCLA liability as an 'operator' of a facility"); see also KFD  
6 Opp. at 5:18-19 (stating "KFD has not alleged that ERI is an 'Owner' in its [4AC]").)

7         2. ERI's motion to dismiss the 4AC's First and Third Claims for Relief to the extent  
8 such claims are based on ERI's liability as an "operator" of the subject property, likewise is  
9 DENIED as moot, for the reason that KFD does not allege ERI is an operator of said  
10 property under either CERCLA or the HSAA, but rather that ERI is liable as an operator of  
11 one or more monitoring wells located thereon (see, e.g., 4AC ¶ 39 (alleging "ERI's drilling  
12 and construction of monitoring wells from 2000 through 2002 resulted in the release and  
13 spread of contamination"); KFD Opp. at 5:12-13 (stating "KFD's allegations that ERI is an  
14 operator of a facility are proper by virtue of mishandling its wells")); for purposes of the  
15 instant motion, ERI does not challenge the adequacy of such allegations (see Mot. at  
16 14:12-13).

17         3. ERI's motion to dismiss the 4AC's Fifth Claim for Relief, alleging a common law  
18 cause of action for contribution, is hereby DENIED. Contrary to ERI's assertion, KFD has  
19 alleged it has incurred costs. (See, e.g., 4AC ¶ 41 (alleging KFD "has incurred, and will  
20 continue to incur, necessary response costs, including costs of investigation, removal  
21 and/or remedial action"). Further, contrary to ERI's assertion, such claim adequately  
22 alleges KFD has paid more than its share. (See 4AC ¶ 72 (disclaiming liability for any  
23 portion of costs incurred)); see also Cal. Civ. Code § 1432 (providing "[a] party to a joint, or  
24 joint and several obligation, who satisfies more than his share of the claim against all, may  
25 require a proportionate contribution from all the parties joined with him").

26         **IT IS SO ORDERED.**

27         Dated: April 28, 2011

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MAXINE M. CHESNEY  
United States District Judge